Supreme Court, U.S.
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No. _____

IN THE
Supreme Court of the United States
OCTOBER TERM, 1997

SCHUYLKILL ENERGY RESOURCES, INC.,
Petitioner,

v.

PENNSYLVANIA POWER & LIGHT COMPANY,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. May a prospective entrant in a market that is currently reserved to a legal monopolist suffer antitrust injury, actionable under Section 2 of the Sherman Act, during the time prior to the opening of that market to competition?

2. Is summary reversal warranted to permit amendment of a complaint where the District Court made no finding that amendment would be futile and the Court of Appeals has identified no pleading deficiencies that are incurable?

PARTIES TO THE PROCEEDINGS BELOW

Petitioner, Schuylkill Energy Resources, Inc., was plaintiff-appellant below. Respondent, Pennsylvania Power & Light Company, was defendant-appellee below.

RULE 29.1 STATEMENT

Petitioner has no parent, subsidiary or affiliated corporations.

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SCHUYLKILL ENERGY RESOURCES, INC.,
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PETITION FOR A WRIT OF CERTIORARI

Petitioner, Schuylkill Energy Resources, Inc. ("SER"), respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Third Circuit.

OPINIONS AND ORDERS BELOW

The opinion of the Court of Appeals is reported at 113 F.3d 405 and is reprinted in the Appendix to this petition ("App.") at 1a. The opinion of the District Court is reported at 1996-1 Trade Cases (CCH) ¶ 71,447 and is reprinted at App. 27a. The unreported Order of the Court of Appeals denying petitioner's petition for rehearing is reprinted at App. 41a.

JURISDICTION

The judgment of the Court of Appeals was entered on May 5, 1997. Petitioner's petition for rehearing was denied by Order entered on June 2, 1997. Petitioner invokes the jurisdiction of this Court pursuant to 28 U.S.C. § 1254(1).

STATUTES INVOLVED

This case involves the legal sufficiency of two causes of action setting forth claims for damages, as authorized by Section 4 of the Clayton Act, 15 U.S.C. § 15, arising out of violations of Section 2 of the Sherman Act, 15 U.S.C. § 2. Section 2 of the Sherman Act makes it unlawful for any person to "monopolize, or attempt to monopolize, . . . any part of the trade or commerce among the several states . . . ." Section 4 of the Clayton Act provides, in pertinent part, that "any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent . . . and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee."

The questions presented also implicate Pennsylvania's Electricity Generation Customer Choice and Competition Act, 66 Pa. C.S. §§ 2801, *et seq.*, the relevant provisions of which are set forth in the Appendix at 77a.

STATEMENT OF THE CASE

In a dynamically changing world, it is not uncommon for economic markets to open that once were closed to competition or never existed. This happens when a patent

expires and the legal monopoly conferred by it ends,[1] when new technology is developed, and when, as is relevant here, historically regulated industries are deregulated.[2] Frequently, the opening of previously restricted markets, presenting new opportunities for competition, is foreseeable by existing entities whose legal monopolies are threatened. In anticipation of the new competitive regime, they may be driven to attempt to dampen or eliminate competition when barriers to market entry are finally removed.

Thrown out of court on a motion to dismiss and denied leave to amend its complaint,[3] petitioner in this case was foreclosed from attempting to prove that a regulated electric utility, anticipating the deregulation of the retail electric market that it currently monopolizes, took steps to maintain

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[1] Although the United States Patent and Trademark Office publishes no statistics reflecting the number of granted patents that expire each year, a rough approximation for the agency's current fiscal year (October 1, 1996 through September 30, 1997) can be obtained by looking at the number of patents issued in fiscal year 1980. More than 61,000 were issued which would expire this year, if not subject to renewal. *Commissioner of Patents and Trademark Annual Report: Fiscal Year 1980* (Table 12).

[2] As of May, 1997, more than 20 state legislatures were considering bills that would provide retail electric market competition. Nine other states had introduced deregulation study bills. As of June, 1997, eleven states, California, Maine, Massachusetts, Michigan, Montana, Nevada, New Hampshire, New Jersey, New York, Oklahoma and Pennsylvania were actively implementing electric industry deregulation as directed by statute or regulatory initiative. *Retail Wheeling and Restructuring Report*: Volume 4, Number 1 (June 1997), Edison Electric Institute.

[3] The "complaint" referred to throughout this petition is petitioner's "First Amended Complaint," which was filed on October 10, 1995. The complaint was amended "as a matter of course" (pursuant to Fed. R. Civ. P. 15(a)) in response to defendant's first motion to dismiss, which was never considered by the District Court.

its monopoly power within its service territory after deregulation becomes a reality.

A. *Factual Background*

Petitioner is the owner-operator of a single electric power plant in central eastern Pennsylvania. In August, 1995, petitioner brought suit in the United States District Court for the Eastern District of Pennsylvania against respondent, Pennsylvania Power & Light Company ("PP&L"), a regulated electric utility whose legal monopoly to provide retail electric service is protected, for the present, by state statute. 66 Pa. C.S. §§ 1101-1102; J. App. at 4a.[4]

Petitioner's complaint alleged that PP&L had attempted to weaken or destroy it as a potential competitor by suddenly and extravagantly abusing an escape clause in a contract which obligated PP&L to buy from petitioner electricity for resale. App. at 2a, 6a; J.App. at 17a - 24a. Under the aegis of Section 210 of Title II of the Public Utility Regulatory Policies Act of 1978 ("PURPA"), 16 U.S.C. § 824a-3, which requires, among other things, electric utilities to purchase energy from independent producers who qualify ("qualifying facilities" or "QFs"), the contract between PP&L and petitioner requires PP&L to buy all of the electricity petitioner produces up to 79.5 megawatts.[5] App. at 5a. However, it also contains an exception enabling PP&L, unilaterally, to declare the existence of "system emergencies" and thereby

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[4] All citations to the complaint, docket entries or the power purchase contract between the parties, are to the Appendix filed by petitioner in the Court of Appeals and denominated here as "J. App. at ."

[5] Petitioner's plant is a "qualifying cogeneration facility" (producing both electricity and process steam from culm, an anthracite waste fuel), as defined by the Federal Power Act, 16 U.S.C. § 796(17), and section 210 of PURPA, 16 U.S.C. § 824a-3(j). J. App. at 12a.

justify intermittent reductions in its purchases. PP&L's discretion to invoke this clause is limited by a proviso that a "system emergency" may not be declared for "reasons of economic dispatch." App. at 5a-6a; J. App. at 18a - 19a.[6]

One of the principal purposes of Section 210 of PURPA was to reduce demand for conventional fossil fuels by encouraging the development of independently owned power production facilities. App. at 3a; *Federal Energy Regulatory Commission v. Mississippi*, 456 U.S. 742, 750 (1982). Congress sought to accomplish this inherently pro-competitive goal by eliminating two historical barriers to non-traditional generating facilities: the reluctance of incumbent electric utilities to deal with them and the economic disincentive to their development engendered by substantial regulatory obligations. 456 U.S. at 750-51. These serious impediments to market entry meant that only by obtaining a long-term PURPA contract could an independent producer, such as petitioner, obtain the project financing necessary to build its power plant. Accordingly, abuse by a utility purchaser, such as PP&L, of the opportunity to invoke PURPA contract exceptions, to escape the obligation to buy QF generated electricity, has the potential to undermine the economic viability of the independent producer.[7]

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[6] The contract defines a "system emergency" as "any condition . . . which, in PP&L's opinion, may disrupt service to customers or endanger life or property." J. App. at 76a (Article 1, ¶ CC). However, it also bars PP&L from curtailing purchases of petitioner's output "for reasons of economic dispatch," *e.g.*, because other available generating units might be producing electricity at the time at a lower cost. App. at 6a.

[7] In addition to loss of revenue, curtailment imposes substantially increased costs on the independent producer, including supplemental fuel and electricity purchases to keep its plant operating, as well as extra personnel and maintenance expenses associated with dramatic reductions in output. App. at 6a.

The inference that PP&L abused its power to declare alleged "system emergencies" became inescapable when the number of these events inexplicably multiplied. In the four and one-half years preceding July, 1994, PP&L invoked its unilateral power to curtail energy purchases from petitioner only 16 times. Suddenly, in a single year (July 1994 to July 1995), the number of curtailments jumped to 83. PP&L offered no credible explanation for this startling increase. J. App. at 20a (¶ 48). Moreover, evidence mounted that the utility was not demanding comparably stringent curtailments of its own generating units. J. App. at 18a - 19a (¶ 41). Since, by law, all PURPA contract costs incurred by PP&L are reimbursed dollar for dollar by its ratepayers, J. App. at 15a (¶ 24); *Lehigh Valley Power Committee v. Pennsylvania Public Utility Commission*, 128 Pa. Commw. Ct. 259, 266 n. 10, 271, 563 A. 2d 548, 552,554 (1989), and, by contract, "reasons of economic dispatch" must play no part in the decision to curtail, J. App. at 19a (¶ 42), there was no plausible motive for PP&L to abuse this prerogative other than the anticompetitive aim of weakening or destroying petitioner as a potential competitor. Accordingly, petitioner filed this lawsuit.

B. Litigation in the District Court

In response to the complaint, PP&L moved to dismiss. The District Court denied the motion without prejudice and stayed the proceedings pending the outcome of a related request for declaratory relief by PP&L to the Pennsylvania Public Utility Commission. On petitioner's motion to reconsider the stay, the District Court, *sua sponte*, revived the motion to dismiss, heard oral argument and ordered the parties to file letter briefs on the issue. J. App. at 8a.

In the interim, petitioner learned that negotiations, involving all of Pennsylvania's public utilities and the Public

Utility Commission, were underway behind closed doors to draft legislation, with the encouragement of the Governor's Office, to deregulate the retail electric market. App. at 101a-102a n.1. In letter briefs, petitioner sought leave to amend its complaint, if the District Court were inclined to dismiss its antitrust claims, App. at 63a n.1, 70a n.2, to demonstrate, among other things, that retail competition was imminent and that this knowledge had motivated PP&L to engage in predatory conduct intended to damage petitioner and other potential competitors prior to the opening of the market. As the Court of Appeals later observed, petitioner's proposed amendment would have provided detailed "allegations regarding . . . SER's future ability to compete in the retail market, and . . . PP&L's efforts to thwart SER's present and future competitive undertakings." App. at 23a.

Apparently unimpressed by the prospects of an amended complaint, the District Court promptly granted PP&L's motion to dismiss the antitrust claims with prejudice "because SER has not alleged antitrust injury." App. at 32a. The court stated that, although petitioner may have alleged a violation of PURPA or the common law, a contractual or regulatory breach was not the same as a viable allegation of injury under the antitrust laws. Even though the District Court recognized that "actions that violate PURPA could conceivably violate the antitrust laws as well," App. at 35a-36a (quoting *Kamine/Besicorp Allegheny L.P. v. Rochester Gas & Electric Corp.*, 908 F. Supp. 1194, 1203-04 (W.D.N.Y. 1995)), it held that one violation did not follow from the other and that, in this instance, "the claimed antitrust injuries are extremely remote from the actions complained of." App. at 38a (quoting *Austin v. Blue Cross & Blue Shield of Atlanta*, 903 F.2d 1385, 1392 (11th Cir. 1990)).

Petitioner had argued that "[t]he enactment of PURPA flowed from the awareness that utilities are hostile to non-utility generation since such generation is clearly in competition with the utilities and displaces generation plant the utility would add to rate base, or power purchases from sister utilities." *Lehigh Valley Power Committee v. Pennsylvania Public Utility Commission*, *supra*, 563 A.2d at 552 n. 10. However, the District Court found that this was only an "allegation of speculative future antitrust injury, *especially in the context of a highly regulated industry . . .*," App. at 37a (emphasis added), and dismissed the complaint, conspicuously failing to acknowledge petitioner's request for leave to amend, much less making findings that amendment would be futile. Petitioner perfected a timely appeal. J. App. at 10a.

Within six months of the District Court's dismissal of the complaint, the ongoing, electric power industry negotiations culminated in the enactment by the Pennsylvania legislature of the Electricity Generation Customer Choice and Competition Act ("Choice and Competition Act" or "the New Act"), 66 Pa. C.S. § 2801, *et seq*. The New Act provides for deregulation of the retail electrical power market on a pilot basis beginning in 1997, with statewide deregulation in three equal phases over a two year period beginning in January 1998. 66 Pa. C.S. § 2806(a) and (b). App. at 87a-88a. A week before oral argument, petitioner submitted a true copy of the New Act to the Court of Appeals to illustrate the District Court's error in describing as too "speculative" alleged injuries to future competition in the soon-to-be deregulated market. App. at 56a.

C. *Rulings of the Court of Appeals*

The United States Court of Appeals for the Third Circuit affirmed the District Court judgment, holding that petitioner

had failed to allege antitrust injury. App. at 24a. Additionally, notwithstanding the absence of a District Court finding of futility, the Third Circuit precluded petitioner from amending its complaint. App. at 23a.

The Third Circuit began by reasoning that, to allege antitrust injury, petitioner must be a competitor in the same market as the malefactor. Focusing only on the presently regulated retail market, the court described petitioner as a *supplier* to PP&L, as opposed to a *competitor*, because the court found that petitioner had admitted in its complaint that the contract required petitioner to sell all of its electricity exclusively to PP&L, App. at 14a-15a, despite contract language to the contrary, J. App. at 19a (¶ 46), 77a (Article 3), and petitioner's argument that no such admission was intended. App. at 43a, 50a, 52a-53a, 69a-70a. Then, continuing to limit its analysis to present market conditions, the court concluded that petitioner was barred, by its judicial admission and regulatory law, from competing with PP&L in both the retail and wholesale markets. App. at 17a-19a.[8]

These holdings ignore completely the competitive opportunities that can reasonably be anticipated under Pennsylvania's New Act, once regulatory barriers to market entry have been removed. As even the Third Circuit had to acknowledge, the New Act will permit retail competition in PP&L's service territory. App. at 15a-16a. Therefore, beginning as early as 1997, in the retail pilot programs

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[8] To rationalize its erroneous determination that petitioner's failure to satisfy alleged regulatory preconditions to selling bulk power to utilities other than PP&L for resale bars it from claiming that it is PP&L's competitor in the presently accessible wholesale electric market, the Court of Appeals ignored petitioner's QF status and relied upon an inapposite provision of the Federal Power Act (16 U.S.C. § 824a instead of § 824a-3). App. at 18a.

mandated by the New Act, 66 Pa. C.S. § 2806(g), petitioner will be able to sell electricity (in excess of contract requirements) to PP&L's current retail customers. App. at 90a. Nonetheless, the court held that the New Act

> comes too late for SER's Amended Complaint . . . SER asks us to find that PP&L's generation curtailment policy injures SER today, and that those injuries will inhibit SER's ability to compete with PP&L in the future market . . . We will not attempt to predict the future of competitive retail access in Pennsylvania . . .While SER attempts to characterize itself as PP&L's competitor on the eve of deregulation, we conclude that SER cannot, as a matter of law, establish that PP&L's generation curtailment policy creates an injury of the type the antitrust laws were intended to prevent.

App. at 16a (footnote omitted).

One member of the panel disagreed with the majority's characterization of the contract as a bar to petitioner's competitive aspirations, but joined in the court's judgment that no antitrust injury had been stated. App. at 25a. Though aware that "[c]ompetition in the retail market is currently being phased in," the concurring judge nonetheless followed the lead of the majority in limiting his focus to the current, regulated retail market and concluded that since "there was no competition prior to passage and implementation of the recent legislation," there was no "competitive market" and therefore there "cannot have been antitrust injury". App. at 25a. The concurring judge also agreed that no amendment should have been permitted, but mystifyingly confined his reasoning to possible allegations about the *wholesale* market, thus ignoring altogether the inevitability of deregulated *retail* competition --

the real target of petitioner's contemplated amendment to its complaint. App. at 25a-26a.

REASONS FOR ALLOWANCE OF THE WRIT

I. This Court Should Define the Elements of Antitrust Injury in Emerging Deregulated Markets.

This petition should be granted because, in attempting to justify the dismissal of petitioner's complaint, the Third Circuit has unleashed a dangerous doctrine that is so sharply in conflict with federal antitrust law as to merit condemnation in its infancy.

The court of appeals rejected as too "speculative" for antitrust redress petitioner's claim that PP&L had engaged in unlawful conduct with the intent to allow it to maintain its current monopoly position in the retail market after deregulation. The court reached that result even though it acknowledged that Pennsylvania's Choice and Competition Act, which parallels legislation pending or enacted in a majority of states, will deregulate electric energy generation in Pennsylvania and that petitioner could allege that it is a potential competitor for retail customers in PP&L's own service territory.[9] In the court's view, even though the transition to a free market had already begun and retail competition would be fully phased in by 2001, petitioner had failed to allege "antitrust injury" because it could not identify any injury to competition "today." App. at 16a. The court refused to "attempt to predict the future of competitive retail

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[9] The independent power producers that enter the deregulated market, not surprisingly, will largely be those who have supplied electrical energy to utilities such as PP&L under PURPA contracts. The advanced state of electric industry deregulation is described in footnote 1.

access in Pennsylvania" and denied petitioner the opportunity to present evidence, based on expert testimony and the experience of other states, of how that market would look and how PP&L's present actions were taken with the intent to damage petitioner's ability to compete with it in that market. *Id.*

Various federal courts throughout the country, in non-regulated market contexts, have long recognized that "potential competitors" may employ the antitrust laws to fend off anticompetitive conduct engaged in by monopolists. *See, e.g., Great Western Directories, Inc. v. Southwestern Bell Tel. Co.*, 63 F.3d 1378, 1388-89 (5th Cir. 1995) (potential competitor may have standing to sue); *Bupar v. Ampco Foods, Inc.*, 752 F.2d 445, 450 (9th Cir. 1985) (same); *Riverview Investments, Inc. v. Ottawa Community Improvement Corp.* 769 F.2d 324, 329 (7th Cir. 1985) (potential competitor alleged facts which constitute antitrust injury); *Grip-Pak, Inc. v. Illinois Tool Works*, 694 F.2d 466, 475 (7th Cir. 1983) (potential competitor may sue for lost profits under Section 4 of the Clayton Act); *TV Signal Co. of Aberdeen v. American Telephone & Telegraph*, 617 F.2d 1302, 1307-08 (8th Cir. 1980) (potential competitor may have standing to sue); *Florida Seed Co. v. Monsanto Co.*, 915 F. Supp. 1167, 1176 (M.D. Ala. 1995) (plaintiff who was never in a market sometimes can succeed on an antitrust claim against defendant accused of keeping plaintiff out of that market); *Allen-Myland, Inc. v. Int'l Bus. Machines Corp.*, 693 F. Supp. 262, 300 (E.D. Pa. 1988) (potential competitor may have standing to sue); *Amtrol, Inc. v. Vent-Rite Value Corp.*, 646 F. Supp. 1168, 1176-77 (D. Mass. 1986) (same); *see also* II Phillip Areeda & Donald F. Turner, *Antitrust Law*, § 335c (1978) ("[I]t is as unlawful to prevent a person from

engaging in a business as it is to drive him from it . . . ").[10] In the context of deregulation, prospective competitors may be most vulnerable to predatory conduct *before* legal barriers to market entry are removed. *See* Phillip E. Areeda & Herbert Hovenkamp, *Antitrust Law*, § 340.2j (1992 supp.) ("[C]artel or dominant firms may undertake improperly exclusionary behavior designed to keep prospective entrants out of the market, for such behavior may well be cheaper than doing battle after a new entrant is established." (footnotes omitted)). Under the Third Circuit's new doctrine, however, a potential competitor is stripped of antitrust protection so long as an incumbent firm's anticompetitive conduct takes place before deregulation is complete.

Any transition from a regulated to a competitive market, whether gradual or abrupt, provides existing regulated monopolists with the incentive, economic means, and opportunity to exploit potentially improper methods to preserve market share. Unlike a market that has been historically free, in which prediction of a competitor's future

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[10] *Cf. Reazin v. Blue Cross & Blue Shield*, 899 F.2d 951, 962-63 (10th Cir. 1990) (court finds that a "perceived competitor" had standing and suffered antitrust injury); *Pace Indus., Inc. v. Three Phoenix Co.*, 813 F.2d 234, 240 (9th Cir. 1987) (court found "unpersuasive [appellant's] claim that lost profits for business that was delayed in entering the market or that never entered the market . . . constituted speculative damages"); *Brunswick Corp. v. Riegel Textile Corp.*, 752 F.2d 261, 271 (7th Cir. 1984) (Posner, J.) ("Exclusion from a market is a conventional form of antitrust injury that gives rise to a claim for damages as soon as the existence occurs . . . "); *Charlotte Telecasters, Inc. v. Jefferson-Pilot Corp.*, 546 F.2d 570, 571 (4th Cir. 1976) (For statute of limitations purposes, "exclusion from participation in an industry constitutes a continuing conspiracy, unless the exclusion is final in its impact."). Even the District Court acknowledged in the instant case that "a failure to allege current actual injury to competition is not fatal to [an] attempted monopolization claim." App. at 31a, n.5.

strategy may be problematic, a regulated market in transition affords an extended period in which a legal monopolist can assess its future competitors while retaining the security of monopoly power. Furthermore, the regulated monopolist can be the beneficiary of enhanced cash flow if, as here, the legislature allows recovery during the transition of previously incurred costs that future competitive operations would be unlikely to recapture. 66 Pa. C.S. § 2808, App. at 93a - 97a.

Up against a legal monopolist's entrenched market position, superior market intelligence, and political clout with state oversight agencies -- all of which are artifacts of its regulatory past -- a would-be market entrant has good reason to fear anticompetitive machinations. The potential competitor's vulnerability is augmented by the reality that those agencies, who traditionally ensure that regulated monopolies serve the public interest, have little or no experience in policing competitive markets. It is therefore particularly unsettling when the federal courts, who otherwise stand as the most experienced and even-handed arbiters of fair competition, deny potential competitors in historically closed markets access to a substantial body of federal antitrust law merely because the alleged unlawful conduct took place prior to the completion of deregulation -- the time during which it is most likely that the incumbent monopolist will have the greatest incentive, means and likelihood of success in harming potential competitors.

Given the accelerating pace of deregulation in America and the breadth of public and private interests involved, articulation of the appropriate standard for determining antitrust injury to potential competitors during this process is too important and timely a task to leave to protracted, piecemeal adjudication by the lower courts. The Third Circuit's novel doctrine should not be allowed to germinate.

If this Court takes no action, the case will surely be read by incumbent monopolists who plan ahead as a license to weaken or destroy potential competitors in advance of their opportunity to compete, thereby frustrating a fundamental goal of deregulation.

By focusing exclusively upon petitioner's present role as a *supplier* of electric power to PP&L, the Court of Appeals blinded itself to the manifest purpose of Pennsylvania's new law -- to enable producers (like petitioner) to *become competitors* of public utilities (like PP&L) in the retail market. Indeed, the court's constricted view also undermines the goal of PURPA to promote the development and longevity of independent, innovative producers whose continued existence helps to make America more energy self-sufficient. *American Paper Institute, Inc. v. American Electric Power Service Corporation*, 461 U.S. 402, 404-05,414-15 (1983); *Federal Energy Regulatory Commission v. Mississippi*, *supra*, 456 U.S. at 750-51, 756-57. Perhaps most importantly, however, the court's new doctrine denies to potential competitors in monopolized industries - - entities that are the most vulnerable to anticompetitive conduct and in greatest need of the protections afforded by federal antitrust law - - the use of Section 2 of the Sherman Act to combat the maintenance of monopolies by unscrupulous means and to prevent the substitution of leveraging and other predatory strategies for outmoded regulatory barriers to competition.

If, as petitioner seeks to prove, a monopolist such as PP&L has dramatically increased its curtailments, with an anticompetitive intent to weaken or destroy SER as a potential competitor, all of the criteria for a Section 2 case are met. Since the Court of Appeals understood petitioner's allegations to have encompassed such potential proof, it was error to have

dismissed petitioner's antitrust claims as a "speculative path to recovery under the Sherman Act." App. at 16a.[11]

Far from being too "speculative," petitioner's allegations bear directly upon a market the Pennsylvania legislature decided to open by enacting the Choice and Competition Act. The outline of that market has already begun to develop. Indeed, petitioner claims, and would have to prove, that PP&L specifically targeted its would-be competitor precisely to inflict anticompetitive harm in this market. The Court of Appeals' conclusion that petitioner's claim is too speculative ignores petitioner's claim that anticompetitive consequences were the motivating factor behind PP&L's monopolistic conduct. If such consequences were intended by PP&L, they certainly should not be found to be "too speculative" as a matter of law. Moreover, to the extent that the Court of Appeals refused to "predict" the "future of competitive retail access in Pennsylvania," App. at 16a, it failed to undertake the very inquiry the law regularly requires to assess the merits of potential competitors' antitrust claims.[12]

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[11] The Court of Appeals wrote: "SER asks us to find that PP&L's generation curtailment policy injures SER today, and that those injuries will inhibit SER's ability to compete with PP&L in the future market." App. at 16a.

[12] Predictions of the future characteristics of markets are commonplace in antitrust law. For example, in assessing the propriety of mergers challenged under Section 7 of the Clayton Act, courts must entertain evidence of probability to determine whether the effect of the proposed merger "may be substantially to lessen competition, or tend to create a monopoly . . ." 15 U.S.C § 18. Like the law of attempted monopoly, Section 7 "was intended to arrest anticompetitive tendencies in their 'incipiency'." *United States v. Philadelphia National Bank*, 374 U.S. 321, 362 (1963). Accordingly, "the Supreme Court has made it abundantly clear that the focus is on 'probabilities', not certainties . . ." *Allis-Chalmers Manufacturing Company v. White Consolidated Industries, Inc.*, 313 F.2d 506, 510 (3rd Cir. 1969).

Petitioner recognizes that this Court may be inclined, until case law evolves, to defer review of the significant antitrust question that the Court of Appeals has answered in this case of first impression in the regulatory context. However, a decision by this Court to stay its hand until more courts have spoken would likely subject petitioner, and other similarly situated potential competitors, to the prospect that ultimate vindication of their right of access to the antitrust laws would "come too late" to ensure their viability when competition is permitted. It is therefore fully appropriate for this Court to seize this moment to define the indicia of actionable antitrust injury during a transition from regulated to free markets.

II. This Court Should Summarily Reverse the Denial of Leave to Amend.

After a responsive pleading has been filed, Rule 15(a), Fed. R. Civ. P., enables a party to amend its pleading "only by leave of court." However, the Rule provides that "leave shall be freely given when justice so requires." Petitioner requested leave of the District Court to amend its complaint if the court were inclined to dismiss it. App at 63a n.1, 70a n. 2.[13] The District Court does have discretion to deny leave,

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[13] The Court of Appeals has never required a plaintiff to formally request leave to amend following dismissal of a complaint for legal insufficiency. *District Council 47, American Federation of State, County and Municipal Employees, AFL-CIO v. Bradley*, 795 F.2d 310, 316 (3rd Cir. 1986). Petitioner's request for leave, should dismissal be contemplated, was made in footnotes to petitioner's first letter brief that the District Court requested after oral argument on the motion to dismiss. Petitioner reasonably believed that, because the District Court's stay was still in place, an independent motion would have been regarded as improper. When the District Court called for briefing by letter, that became the available vehicle to present a request for leave to amend in lieu of dismissal. The Court of Appeal's suggestion that a motion could

but there is no sign that it was exercised here; the court did not so much as acknowledge petitioner's request, much less find that amendment would be futile.

Petitioner had advised the District Court that, if granted leave, it would amend the complaint to allege, among other things, that its plant had the capacity to generate "at least 5.5 megawatts, for potential sale to third parties, in excess of the amount which it presently provides by contract to PP&L." App. at 70a n.2. In addition, to demonstrate that the coming of the competitive retail market was anything but speculative, petitioner attached to its second letter brief a PP&L mailing, which included an article entitled "Positioning PP&L for Competition" noting that "[c]ompetition in the electric utility industry is clearly on the horizon" and presenting the steps that PP&L was taking to prepare for it. App. at 101a - 105a.

In oral argument before the Third Circuit, petitioner's counsel reiterated that petitioner had the capacity to compete in excess of its contractual commitment and that it could exploit that to undersell PP&L as well as to provide power that was environmentally friendly. Counsel also made clear that the proposed amendment would emphasize the imminence of deregulation and petitioner's intent to compete vigorously. App. at 43a - 55a.

The response of the Court of Appeals was extraordinary. First, it found the allegation that SER had capacity beyond the

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have been filed earlier, App. at 21a, not only implies a motion requirement that does not exist, but ignores that there was no reason to file such a motion earlier because the District Court had at least tentatively denied the motion to dismiss when it issued the stay. App. at 7a. The first sign that it might reverse that decision came when it ordered oral argument, notwithstanding the stay, and directed the filing of letter briefs. *Id.*

contract "not relevant," App. at 23a, even though proof of this would be the first step in showing that petitioner had the ability as well as the intention to evolve from PP&L's "supplier" to its competitor in the new retail market. Then, *relying on an errant comma,* inadvertently inserted in a paragraph of the complaint, the Court of Appeals found the averment to be an admission by petitioner that it was contractually committed for twenty years to supply *all* of its electricity to PP&L. App. at 15a. Despite protestations by petitioner's counsel during oral argument that no admission was intended and that any such reading would be counter to the language of the contract itself, App. at 43a, 50a, 52a-53a, J. App. at 77a (Article 3), and fly in the face of another paragraph of the pleading that accurately reflected petitioner's true intent, J. App. at 19a (¶ 46), the Third Circuit nonetheless declared that petitioner had admitted that the contract precluded it from competing with PP&L. App. at 15a.[14] Still

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[14] The concurring judge did not join in this strained reading. App. at 25a. Paragraph 22 of the complaint, which the majority construed as a judicial admission because of a comma, reads in pertinent part as follows: "Pursuant to the Power Purchase Agreement, SER is required to sell exclusively to PP&L, and PP&L is required to purchase SER's entire net power output up to 79.5 megawatt . . . ." J. App. at 15a. Paragraph 46 of the complaint, which the court totally ignored, corrects any misapprehension as to the intended meaning of paragraph 22: "Because the Power Purchase Agreement provides that SER will sell its net electric energy output (*up to 79.5 megawatts*) exclusively to PP&L . . . (emphasis added)." J. App. at 19a. Article 3 of the Agreement, which paragraph 22 was intended to track, includes no comma: "Seller agrees to sell and deliver exclusively to PP&L and PP&L agrees to purchase and accept delivery of the Facility's total Net Energy up to 79,500 KWH . . . ." J. App. at 77a. The concurring judge correctly observed " that the Power Purchase Agreement between SER and PP&L is susceptible of an interpretation that SER's duty to sell exclusively to PP&L is limited to the first 79.5 megawatts of its output." App. at 25a.

more startlingly, the Court of Appeals held that amendment would be futile even though, among other things, an amendment would have removed the comma upon which the majority relied.

Finally, the Court of Appeals only considered the validity of the complaint *as of the time it was filed* rather than as of the time of decision, thereby eliminating from its consideration the intervening legal and factual progress of deregulation. App. at 24a. That was error. Fed. R. Civ. P. 15(d). But, at the very least, that too should have led the court to grant petitioner leave to *update* the complaint by amendment to show that competition was by no means speculative.

These decisions by the Court of Appeals run roughshod over fundamental tenets of federal practice:

1. That "[l]awsuits should be determined on their merits and according to the dictates of justice, rather than in terms of whether or not the averments in the paper pleadings have been artfully drawn." Charles A. Wright & Arthur R. Miller, *Federal Practice and Procedure: 2d*, § 1286 at 548; *see also* Fed. R. Civ. P. 8(f) ("All pleadings shall be so construed as to do substantial justice.").

2. That complaints should be liberally construed to honor the pleader's intent and may not be dismissed unless there is no state of facts that would warrant relief. *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957);

And, most importantly here,

3. That leave to amend should be freely granted whenever justice so requires. Fed. R. Civ. P. 15(a).

Accordingly, if this Court is disinclined to grant a full hearing on this case, it should summarily reverse the denial of

petitioner's request for leave to amend its complaint. The federal rules promise petitioner an opportunity to provide details further supporting its claim and this Court should see to it that this promise is not broken.

CONCLUSION

For the reasons set forth, the petition for certiorari should be granted or the judgment of the Court of Appeals summarily reversed with instructions that petitioner be afforded leave to amend its complaint.

Respectfully submitted,

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